MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON ENERGY AND TELECOMMUNICATIONS

Call to Order: By **CHAIRMAN ROYAL JOHNSON**, on January 21, 2003 at 3:00 P.M., in Room 317-C Capitol.

ROLL CALL

Members Present:
- Sen. Royal Johnson, Chairman (R)
- Sen. Corey Stapleton, Vice Chairman (R)
- Sen. Bea McCarthy (D)
- Sen. Walter McNutt (R)
- Sen. Gary L. Perry (R)
- Sen. Don Ryan (D)
- Sen. Emily Stonington (D)
- Sen. Bob Story Jr. (R)
- Sen. Mike Taylor (R)
- Sen. Ken Toole (D)

Members Excused: None.

Members Absent: None.

Staff Present: Todd Everts, Legislative Services Division
Marion Mood, Committee Secretary

Please Note:
Audio-only Committees: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing & Date Posted: SB 215, 1/15/2003
Executive Action: SB 70; SB 77; SB 2; SB 146

HEARING ON SB 215

Sponsor: **SEN. KEN TOOLE, SD 27, HELENA**

Proponents:
Gene Fenderson, MT Progressive Labor Caucus
Mary Caffero, WEEL
Ted Rogers, self
Don Judge, Teamsters Local 190

Opponents:
Geoff Feiss, General Manager, MT Telecom. Assn.
Mike Strand, CEO, Mt Independent Telecom Systems
Rick Hays, Qwest
John Alke, MDU
Mark Baker, AT&T
Scott Odegard, MT Electric Cooperatives Assn.
Tom Harrison, MT Cable Telecom Assn.
John Fitzpatrick, NorthWestern Energy
Roger Halver, MT Association of Realtors
Dave Galt, Director, MDT
Rick Nick, Sheridan Co-op.
Mary Whittinghill, MT Taxpayers Assn.
Neil Colwell, Avista Corp.
Webb Brown, MT Chamber of Commerce

Opening Statement by Sponsor:

SEN. KEN TOOLE, SD 27, HELENA, opened by saying the bill's intention was to charge up to $1.00 per lineal foot of utility lines and cables located within a public right-of-way. SB 215 allows for the fees to be split according to the percentage of ownership should there be more than one owner, and fees are set by the entity owning the largest percentage of land. In the case of relocation, dismantling or removal of the utility cables to make room for highway construction, the bill provides for the state to pay only 50% of the costs involved whereas currently, the state participates with 75%. He went on to say that a number of states derive revenue from such charges and thought it fair that the utility companies paid a fee to use the public right-of-ways. He advised the committee that some assumptions had been made in the Fiscal Note for which a consensus needed to be found; one made the charge a one-time fee, and the other made the fees applicable to new facilities only. The sponsor preferred an annual fee, applicable to new as well as existing facilities. Based on the 36,000 miles of land administered by the MDT, the annual revenue derived from that alone would be $2,000,000 if the maximum fee of $1.00 per lineal foot was levied. He added he would like to see this apply to co-ops as well because he did not think non-regulated, for-profit businesses should be able to use public right-of-ways free of charge. In his opinion, the state was providing a valuable asset to the utilities in this age of deregulation, enabling them to do business without having to provide any revenue to local governments in exchange for using this asset.

Proponents' Testimony:

Gene Fenderson, MT Progressive Labor Caucus, in citing the current budget crunch, stated his organization had put together a "fair share tax package" which included levying fees such as a right-of-way tax. He was adamant about the fact that the state paid 75% for removal of private property from public right-of-ways for road or bridge expansion and felt that as a matter of fairness, the private, and unregulated, utility companies should pay their fair share.

Mary Caffero, WEEL, also rose in support of SB 215, proclaiming that due to the budget shortfall, human services had been severely cut. She praised SB 215 as being part of the solution to create much needed revenue. She went on to say Medicaid played an essential role in the lives of many Montanans and moreover, it stimulated the state's business activity and economy. To bolster her statements, she handed out **EXHIBIT(ens12a01)**, "Economic Impact of Medicaid on Montana".

Ted Rogers, self, stated as an end-stage renal patient, he was very much dependent on the care provided by the state, and with the current budgets cuts, additional revenue sources were extremely important to the human services programs.

Don Judge, Teamsters Local 190, before handing in written testimony, **EXHIBIT(ens12a02)**, voiced his surprise that this bill had been assigned to this committee instead of the Taxation Committee. He stated that it was very important for the state to find additional sources of revenue for its citizens and went on to say when the telephone and the energy industries were regulated, they had enjoyed guaranteed rates and a guaranteed rate of return and as a benefit, they had access to public lands and right-of-ways. Now the dynamic had changed, yet these companies were continually granted free access to public lands. He used the school trust lands as an example where access fees were charged to everyone but the utility companies. In closing, he charged that according to a recent PP&L publication, the annual revenues realized from their Montana generation assets were in excess of $107 million. This legislation would help recover some of the monies taken out of the state by private and profitable businesses.

Opponents' Testimony:

Geoff Feiss, General Manager, Montana Telecommunication Assn., stated his clients have deployed about 6,000 miles of fiber optic cable throughout the state for high-speed DSL internet and broadband service, much of which is also used by tribal colleges and other learning and medical facilities. This network reaches about 150 communities and represents a $70 million annual investment in the state's infrastructure. These companies need these rights-of-way, whether private or public, to provide vital services to the state. He reminded the committee that the companies represent private investment, employing more than a thousand Montanans and providing growth and value to Montana's economy. He charged that this bill threatened to increase the cost of doing business dramatically and felt that it singled out select utilities and telecommunication providers in its fervor to balance the budget with a retroactive tax.
{Tape: 1; Side: B} He called it discriminatory and feared the negative consequences it would have on investment in and deployment of infrastructure, business development, and growth. He pointed to lines 10 and 11 on page 2, saying he thought this was aimed at the city of Billings which imposed a tax on right-of-way and is now before the Supreme Court for illegally imposing an income tax. He also felt that this would go beyond just public rights-of-way as private landowners would use this $1 per foot model to impose fees for infrastructure on private land. He urged the committee not to pass this legislation as it was a barrier to growth and investment and a tax increase for the very companies who worked to promote Montana's economy.

Mike Strand, CEO, Montana Independent Telecommunications Systems, agreed with previous testimony and welcomed the sponsor's willingness to exempt cooperatives but since his organization also operated telephone companies which were wholly owned subsidiaries of the co-ops, coupled with the fact that they pooled resources with cooperatives and non-cooperatives because of the high cost of deploying networks across the state, he spoke out against SB 215. He surmised that these partnerships were subject to the right-of-way tax and warned that this would further deter businesses from locating in the state. The cost of serving people in rural areas would be driven up tremendously due to the mere fact that many homes and ranches are located miles away from the nearest switching offices because at one dollar per lineal foot, each mile of cable would be taxed at $5,280. He informed the committee that most private landowners donate the right-of-way in exchange for the companies' commitment to bring high-quality service to them. He also took offense at the prospect of the state's decreasing participation in the cost of relocating facilities when the state engages in construction or other projects. He mentioned that he had worked on the Utility Task Force established by the MDT where it was agreed to maintain the current cost sharing formula and said they would have avoided using state-owned right-of-ways in some instances had they known this was going to be changed. He was adamant about the difficulty and costs involved in tearing up existing facilities and relocating them to private rights-of-way. He urged the committee not to pass this bill.

Rick Hays, Qwest, also believed this bill would have an extremely negative impact on Montana and specifically on businesses in need of receiving advanced communication services. It would have a stifling effect on the telecommunications industry at a time when economic growth and job creation were more important than ever and charged the cost would ultimately have to be borne by Montana's consumers. He added that his company employs 500 Montanans with an annual payroll of $27 million, had a tax liability of $16 million in 2001 and invested $135 million in Montana's network during the last ten years alone. He warned that a proposal like SB 215 sent a chilling message to Qwest and other telecommunication providers that the investment climate has changed for the worse. In his opinion, its implementation was in direct violation of the Telecommunications Act of 1996 because it provides that states and local governments may charge fair and reasonable compensation for the use of public right-of-ways and that those fees should be based on actual costs directly incurred as a result of the companies' use of right-of-ways. He saw SB 215 as an obstacle, preventing or significantly reducing the future deployment of advanced communications services in Montana. **Mr. Hays** also voiced strong objections to the provision in Section 4 which reduce reimbursements for relocation of facilities and equipment on state and federal highway projects, saying that he and his company had worked closely with the MDT in locating equipment where it was best suited for everyone involved, and he did not agree that the private companies should pick up the tab should those plans change in the future. All this served to do was to further diminish the investments made by the service providers. Lastly, he claimed that the current 75% cost-sharing agreement encouraged efficiency and cooperation between the state and the service providers.

John Alke, MDU, pointed out that utilities are cost-of-service entities and if this bill passed, it would be the consumers who would foot the bill because the rates would be raised by the exact amount of the fees collected through this bill. It would not be MDU nor its North Dakota or South Dakota customers who paid this fee but its Montana customers. As an aside, he informed the committee that according to MDU, if North Dakota's or South Dakota's Highway Department relocates a highway, they pay 100% of the relocation expense.

Mark Baker, AT&T, voiced the same strong concerns against SB 215 as previous opponents had and referred to it as the "5280 bill" as it added $5,280 to every mile of fiber optic cable buried in state right-of-way.

Scott Odegard, MT Electric Cooperatives Assn. (MECA), handed in written testimony, **EXHIBIT(ens12a03).**

Tom Harrison, MT Cable Telecommunications Assn., charged that it was unrealistic to think the state could take $200 million from regulated or unregulated activities and not end up paying for it. He called it a tax on necessities and admitted his surprise at the people who testified in favor of it.

John Fitzpatrick, NorthWestern Energy, reminded the committee that the State of Montana had granted the use without fees to utility companies for two purposes; 1) to ensure that the greatest number Montanans had access to their services, and 2) to see these services were available at a low cost. The provisions of SB 215 would drastically change the cost issue because it would substantially increase the cost of providing those services. He also did not believe the amount of $1 per lineal foot would be etched in stone because historically, governments raised fees over time rather than decrease them. In an attempt to put this cost in perspective as it pertained to NorthWestern Energy, he had his home office compile the numbers, and they came up with a range of $35 million to $105 million in fees with regards to facilities and equipment already in place. The average cost, then, was $70 million which would translate into a $185 rate increase to electric customers and $135 rate increase to gas customers. He surmised that it also would add roughly $400 thousand per year in right-of-way cost to future endeavors. He cautioned that all this additional cost would be passed on to the ratepayers.

Roger Halver, MT Association of Realtors, in the interest of time, asked that the bill be tabled.

Dave Galt, Director, MDT, stated he was the author of the Fiscal Note, **EXHIBIT(ens12a04),** but understood the bill to say this tax was to be levied on new infrastructure only. He repeated the sponsor's estimate of about 36,000 miles of utility infrastructure which would add up to $190 million total fees. He hastened to say that this figure did not include cities and towns and other right-of-ways. He also informed the members the costs of relocating facilities because of construction projects are

100% federal aid eligible with the charges depending on the project classification. The projected work for the coming year was estimated at $3.7 million of utility right-of-way relocation. In closing, he mentioned the Governor's concern about Montana's working families and what impact the implied rate increase would have on them, and urged the committee to table SB 215.

{Tape: 2; Side: A}
Rick Nick, Sheridan Co-op, advised the committee of the wide-spread movement to develop regional water systems for rural areas, which necessitates laying hundreds of miles of pipeline. One of the areas approved for such work is Daniels County which is over 50% state land, and the provisions of this bill would place an undue burden on the ratepayers.

Mary Whittinghill, MT Taxpayers Association, reiterated previous opponents' testimony. She also wanted to clarify the distinction between a fee and a tax, saying that a fee is specific to recovering the cost of providing a service; and a tax is meant to generate revenue. She felt that the fee imposed by SB 215 was a selective sales tax which would discourage new investment at a time when new investment was sorely needed.

Neil Colwell, Avista Corporation, in referring to the proponents' testimony, was not sure how the funds generated by this bill would be distributed. He also alluded to the comment that it was high time the utility companies paid their fair share. In his case, he explained, they paid a tax on the transmission property which is taxed at a rate four times higher than other business equipment, for a total of $2.5 million annually. In addition, each kilowatt is taxed through the wholesale record transmission tax for roughly half a million dollars per year, and if this new tax was levied, it would amount to another half million dollars per year, increasing their total tax liability by about 25%.

Webb Brown, Montana Chamber of Commerce, also rose in opposition to SB 215.

Questions From Committee Members And Responses:

There were no questions from the committee.

Closing by Sponsor:

SEN. TOOLE held fast in his belief that some kind of fee should be levied, repeating much of the reasoning in his opening statement. He said it should be set by the appropriate state agency, and it could be capped at $1/foot. He tried to dispel the opponents' claim that 100% of the cost would have to be borne by the consumer by saying that some facilities who are moving commodities are required to be common carriers, and the contract for the commodity was going to reflect the cost of the transmission. In closing, he asked the committee to consider not making it an annual and retro-active tax and to safe-guard that federal highway dollars would not be lost.

EXECUTIVE ACTION ON SB 70

Motion/Vote: **SEN. MCNUTT** moved that **SB 70 DO PASS. Motion carried unanimously.**

EXECUTIVE ACTION ON SB 77

CHAIRMAN JOHNSON stated that he had **Todd Everts** draw up a technical amendment, **SB007701.ATE, EXHIBIT(ens12a05).**
Motion: **SEN. MCCARTHY** moved that **AMENDMENT SB007701.ATE BE ADOPTED.**

Discussion:

Todd Everts explained this technical amendment ensured that the Universal Systems Benefits extension went through December 31, 2005. **Vote**: Motion **TO ADOPT SB007701.ATE carried unanimously.**

Motion: **SEN. JOHNSON** moved that **SB 77 DO PASS AS AMENDED.**

Substitute Motion: **SEN. STONINGTON** made a substitute motion to **EXTEND THE PROGRAM TO 2013.**

Discussion:

SEN. STONINGTON maintained that the extension through just 2005 had to do with the fact that the function and purpose of this program were being scrutinized and it was thought best to reconsider these issues after a two and a half year extension. She felt it would be helpful to have it go for a longer period of time to give it more stability. **SEN. STORY** stated he had a hard time supporting the bill in the first place, and he especially could not support the program for that length of time. **SEN. McNUTT** agreed, saying there was a myriad of issues contained in the USB program, and as far as he was concerned, it had been a compromise to extend the program through 2005 so it could be revisited and perhaps changed or abolished. He also would not support the bill if it was extended through 2013. **SEN. STAPLETON** asked where the year 2013 had come from, and **SEN. STONINGTON** replied that it was an arbitrary date. **SEN. TOOLE** favored a longer extension as well and advised the members that part of the rationale behind USB was energy conservation, and it was difficult for companies like NorthWestern to acquire conservation resources without knowing whether the funding source would be secure, and thus their pursuit of these measures would be less likely. **SEN. GARY PERRY, SD 16, MANHATTAN**, agreed with **SENS. STORY and McNUTT**, stating he felt that the USB program was simply a redistribution of wealth, pointing in particular to the testimony of Ed Roe who was awarded the $10,000 grant to build the solar system in his own home. He made clear that he would at most support a 2005 deadline, albeit with reservations. **SEN. STONINGTON** declared she did not want to jeopardize the bill because USB was a good program, and **withdrew her substitute motion.**

Discussion on SB 77 as amended:

SEN. STORY disputed that the money used for the program was all ratepayers' money, saying the large industrials participated as well. He went on to say he had the same concerns during the previous session, that once the program was rate-based it became almost an entitlement, letting the companies use rate-payers' money to participate in conservation measures and low-income energy assistance which were things the public pressured them into. He also pointed out that some efforts called "conservation" were actually demand reductions, citing Ed Roe's savings of about 6,600 kilowatt hours a year which, at 7 cents per kilowatt hour, amounted to $462. He charged that with an investment of at least $10,000, this was not good economics. Referring to the drop in spending on demand reduction measures, he claimed it had to do with the "law of diminishing returns", because once people's homes were well-insulated, one would run out of places in a house to save electricity. He predicted that in another couple of years, this plan would have run its course and suggested other ways of creating social programs. **CHAIRMAN JOHNSON** maintained that SB 77 was an important bill, and the program had been run efficiently through Energy Share. He had proposed an extension for two and a half years so that this would be looked at by this Legislature because oftentimes, programs would just be pushed aside and were not given any consideration. He repeated that he did not want it to go longer so that it would be examined again by the next Legislature.
{Tape: 2; Side: B}

SEN. McNUTT stated that while it was a worthwhile program, it did not need to go beyond two years because some issues needed to be looked at again to make sure the monies were well-spent.

Vote: Motion that **SB 77 DO PASS AS AMENDED carried 9-1 with SEN. STORY voting no.**

EXECUTIVE ACTION ON SB 2

Motion/Vote: **SEN. RYAN** moved that **SB 2 BE TABLED. Motion carried unanimously.**

EXECUTIVE ACTION ON SB 146

Motion/Vote: **SEN. TAYLOR** moved that **SB 146 DO PASS. Motion carried unanimously.**

ADJOURNMENT

Adjournment: 4:30 P.M.

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SEN. ROYAL JOHNSON, Chairman

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MARION MOOD, Secretary

RJ/MM

EXHIBIT(ens12aad)